Supreme Court, U. S.
FILED
MAR 11 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1294

In the Matter of
THE BOHACK CORPORATION,

Debtor.

THE BOHACK CORPORATION,

Petitioner.

-against-

GENERAL WAREHOUSEMEN'S UNION, LOCAL NO. 852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. STANLEY SHAW
Attorney for Petitioner
A member of the Bar of the
United States Supreme Court
770 Lexington Avenue
New York, N.Y.

OTTERBOURG, STEINDLER, HOUSTON & ROSEN
By: Conrad B. Duberstein
A member of the Bar of the
United States Supreme Court
and
FINKEL, NADLER and GOLDSTEIN
By: Harvey Goldstein
Attorneys for the official creditors committee

DICK BAILEY PRINTERS, 290 Richmond Ave., Staten Island, N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

Page

The Opinions Below 2

Jurisdiction 2

Question Presented 3

The Principal Statutes Involved 3

Statement of the Case 5

The Reasons for Granting the Writ 6

Conclusion 19

CASES CITED

In Re Ad Service Engraving Company, 338 F.2d 41 (6th Cir., 1964) 16

In the Matter of Straus-Duparquet, Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers, 386 F.2d 649 (2d Cir. 1967) 25

In Re Men's Clothing Code Authority, 71 F. Supp. 469 (S.D.N.Y. 1937) 18

In Re Otto, 146 F. Supp. 786 (DC Cal. 1956) 18

In Re Public Ledger, 161 F.2d 762 (3d Cir., 1947) 11

Mammoth Mart (Del) and Subsidiaries.
1 Bankruptcy Court Decision 909
(D.C. Mass., 1975) 8

McCloskey v. Division of Labor Law Enforcement. 200
F.2d 402 (9th Cir., 1952) 18

Shopmen's Local No. 445 [NLRB] v. Kevin Steel
Products. Inc., 519 F.2d 698 (2nd Cir. 1975) 7

Other Authority

Bankruptcy Act, Sec. 64a(a), (2); 11 U.S.C. §104 3

Appendices

Order of District Court dated February 20, 1975 ..... 1a

Stipulation 3a

District Court Memorandum Decision 5a

Order and Judgment of Court of Appeals 7a

SUPREME COURT OF THE UNITED STATES

In the Matter of
THE BOHACK CORPORATION,

Debtor.

THE BOHACK CORPORATION,

Petitioner,

-against-

GENERAL WAREHOUSEMEN'S UNION, LOCAL NO. 852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Bohack Corporation, Debtor-in-Possession, requests that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Second Circuit, which affirmed an order of the Hon. Jacob Mishler, United States District Judge for the Eastern District of New York, which in turn affirmed an order of the Hon. C. Albert Parente, Bankruptcy Judge, holding that severance pay for respondent union members, who were discharged after the date of filing by Petitioner of an original petition pursuant to Chapter XI of the Bankruptcy Act, constituted an administration claim against the estate of the Debtor pursuant to Section 64a(1) of the Bankruptcy Act.

THE OPINIONS BELOW

The order of the Bankruptcy Judge entered on February 20, 1975 stated in pertinent part as follows:

> "Thereafter, and on the 22nd day of January, 1975, in the course of an informal hearing on Defendant's application for a temporary injunction, the parties hereto entered into a stipulation providing for the payment of the aforesaid severance pay. The defendant, however, reserved its right to appeal as to the propriety of the Court's declared intention to adhere to the decision rendered by the Circuit Court of Appeals in the matter of *Straus-Du Parquet, Inc. v. Local Union #3, International Brotherhood of Electrical Workers, A.F. of L., C.I.O.*, 386 Fed. 2d 649, wherein the Court held that severance pay constitutes an administration claim.
>
> Constant with the foregoing, it is ORDERED, ADJUDGED AND DECREED that the claim for severance pay herein is deemed an expense of administration and that the Plaintiff have judgment therefor, pursuant to the provisions of the stipulation aforesaid." (A-1, 2)

Judge Mishler in affirming Judge Parente on April 21, 1975, did not issue an opinion. In affirming Judge Mishler on April 12, 1975 (A-7, 8), the Second Circuit Court of Appeals stated (A-8); "affirmed on the authority of *Straus-Duparquet Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers, AF of L, CIO.* 386 F2d 649, (2nd Cir. 1967)."

JURISDICTION

The jurisdiction of this court is invoked, made and confirmed under 28 U.S.C. 1254(1) and Rule 22(3) of the rules of this Court. The Court of Appeals affirmance was entered on December 12, 1975.

QUESTION PRESENTED

Where an employer which has a union contract with a group of employees containing a severance pay provision, files a petition pursuant to Chapter XI of the Bankruptcy Act, and thereafter the employment of the workers covered by the contract is terminated, and such contract contains a provision for severance pay, is the workers' claim for severance pay an administration claim against the estate of the Debtor pursuant to Section 64a(1) of the Bankruptcy Act, or a priority wage claim pursuant to Section 64a(2) of the Bankruptcy Act.

THE PRINCIPAL STATUTES INVOLVED

Bankruptcy Act

"§64. Debts Which Have Priority. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary and expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases) where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, is recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of the recovery; the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under chapter 9 of title 18 of the United States Code, or an offense concerning the business or property of the bankrupt punishable under

other laws, Federal or State; the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases, and to the petitioning creditors in involuntary cases, and if the court adjudges the debtor bankrupt over the debtor's objection or pursuant to a voluntary petition filed by the debtor during the pendency of an involuntary proceeding, for the reasonable costs and expenses incurred, or the reasonable disbursements made, by them, including but not limited to compensation of accountants and appraisers employed by them, in such amount as the court may allow. Where an order is entered in a proceeding under any chapter of this Act directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding, including expenses necessarily incurred by a debtor in possession, receiver, or trustee in preparing the schedule and statement required to be filed by sections 238, 378, or 483, shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding, if any; (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purposes of this clause, the term "traveling or city salesman" shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a

commission basis, with or without a drawing account or formal contract; . . . "

STATEMENT OF THE CASE

This is an action instituted by the Respondent that is a collective bargaining representative for a group of employees whose jobs were terminated by the Petitioner, as Debtor-in-Possession, subsequent to the filing of the original petition pursuant to Chapter XI of the Bankruptcy Act. The original complaint contained 56 causes of action on behalf of individual employees based on the severance pay provision in the contract between the Debtor corporation and the employees' union. Upon submission to the Bankruptcy Court, the Bankruptcy Judge indicated his intention to adhere to a decision of the Second Circuit, *Straus-Deparquet Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers, AF of L, CIO*, 386 F.2d 649. Petitioner and Respondent then entered into an agreement for the Debtor corporation to pay to the union as disbursing agent for all employees the full amount of their severance pay, on a five year installment basis, subject to the debtor corporation's right to appeal the Bankruptcy Judge's decision. (A-3, 4)

By stipulation between the parties, it was agreed that any future decision on the issue of whether severance pay constituted an administration claim would be binding with respect to all members of the union situated similarly to all members of the union on behalf of whom the original complaint was brought (A-4). It was agreed that the total amount due, assuming that the union ultimately prevailed, from the debtor corporation to all union members similarly situated was $607,511.60. That stipulation was embodied in the order of affirmance by Judge Mishler in a footnote to his decision entered on May 28, 1975 (A-6). In fact, the sum of $43,526.49, representing severance pay earned after

the date of the filing of the petition, was agreed upon as an administration claim.

It is agreed by the parties that the contractual provision is a true severance pay provision, and the sole issue involved is whether severance pay constitutes a priority wage claim or an administration claim against the estate of the debtor.

THE REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the question presented herein is appropriate for review by this court both because of the enormous practical economic considerations involved in allowing the Second Circuit's decision in the matter of *Straus-Du Parquet, Inc. v. Local Union #3 International Brotherhood of Electrical Workers, A.F. of L., C.I.O.* to stand, and because there has been such a diversity among the various circuits with respect to the proper way to treat a severance pay action in a Chapter XI proceeding, that a ruling by this court is necessary for a definitive holding as to the effects of such claims against the debtor in a Chapter XI proceeding.

The number and stature of corporations filing for arrangements under Chapter XI of the Bankruptcy Act has dramatically risen, causing a significant increase, both quantitatively and qualitatively, in the Bankruptcy Courts' caseloads and reflecting the practical consequences of bankruptcy rulings on the economics of the nation. Information supplied by the Administration Office of the United States Court shows that between 1969 and 1975 the number of Chapter XI petitions filed throughout the country rose from 867 to 3,506, an increase of more than 400% over a five year period. This in itself demonstrates the important impact of bankruptcy rulings with respect to the economy as a whole.

More importantly, in the last few years the nature and stature of the corporations seeking arrangements has drastically changed. Industrial and commercial giants, once considered immune to vagaries in the nation's economy, have filed such petitions. The Penn Central, Railway Express, W.T. Grant and other corporations of similar stature have sought the aid of the bankruptcy courts in reorganizing. The failure of Railway Express and Grants to successfully achieve reorganization indicates the difficulty involved in such proceedings and the strain placed upon the debtors by virtue of claims made under executory contracts. Needless to say, severance pay claims under rejected labor contracts fall into such a category.

The Second Circuit has recently held in *Shopmen's Local Union No. 445 (NLRF) v. Kevin Steel Products, Inc.*, 519 F.2d 698 that a Bankruptcy Court has the right to approve a Debtor's rejection of an executory labor contract, notwithstanding conflicting provisions of the National Labor Relations Act, upon close scrutiny of the equities involved in such a rejection. It is respectfully submitted that to allow the Court to approve such rejection and at the same time bind the court to recognize one of the most onerous and burdensome aspects of such a contract, i.e., the severance pay provision for which no value is received, would frustrate the purpose of the reorganization proceedings.

The case at hand is a rather obvious example of the inequity of enforcement of a severance pay provision in a Chapter XI proceeding. Although the union, in a spirit of cooperation, did agree to a pay out of the severance pay claim if it was found to be entitled to it, the fact of the matter is that under Second 64a(2) of the Bankruptcy Act each individual claim would be limited to $600 as a priority wage claim. There is no limit, however, in the contract, and

thus the claims of the individuals as administration claims are chargeable to the extent of more than a half a million dollars in cash against the estate above and beyond the limitation of the priority wage claim set forth in Section 64a(2). Inasmuch as an amended plan of arrangement is soon to be submitted, this half million dollars represents a very substantial amount to the other creditors at large, and could conceivably make the difference between an acceptable plan and one that cannot be confirmed, inasmuch as the provisions of the amended plan indicate that a half million dollars represents a substantial percentage of the contemplated payout.

A Bankruptcy Judge in the First Circuit has declined to follow the action of *Straus-Du Parquet, Inc. v. Local Union #3, International Brotherhood of Electrical Workers, A.F. of L., C.I.O.* on the grounds that it is detrimental to the rehabilitation purpose of the Chapter XI proceeding. We herewith quote extensively from relevant portions of Judge Lavien's decision in *Mammouth Mart (Del) and Subsidiaries*, published in Corporate Reorganization Reporter Bankruptcy Court decisions May 29, 1975, at pp. 909-912, which we feel fairly summarizes our position here.

> "In order to insure fairness in return for majority control, the minority was assured of a limited and strictly construed group of statutory priorities found in Sec. 64 of the Bankruptcy Act and an expectation that all other unsecured creditors would be treated equally.
>
> [3] The scant legislative history of Section 64a(1) sheds little light on its scope or application. Prior to 1962, the statute had no generally descriptive words but set out in order a number of specific expenses to be given priority. The order in which specific outlays were listed was construed as creating a schedule of subpriorities, and, therefore, claims under the section were given

relative priority depending upon their position in the statutory list. In 1962, the statute was amended to characterize all Section 64a(1) expenses as "costs and expenses of administration" and to include as such all of the types of expenses formally listed. While the congressional reports accompanying the amendment only indicate Congress' concern that all Section 64a(1) be given equal priority, the Court in *In re Connecticut Motor Lines, Inc.*, 336 F.2d 96 (3rd Cir. 1964) read a mandate for narrow construction into the amendment.

'Through those enumerated costs and expenses of administration were never meant to be all inclusive, the 1962 amendment does indicate a concern that a meaningful view be had as to what is to be considered a cost and expense of administration." 336 F.2d at 102.

See, S.Rep.No. 1954, accompanying H.R. 5393, U.S. Code and Administrative News, pp. 2602-2603 (1962).

About half of the Bankruptcy Act, by volume, has to do with rehabilitation rather than the interment of the financially distressed and this is done by holding off creditors while under the control of the court the salvage job is assayed and undertaken."

46 Am. Bankruptcy Law Journal, 311.

* * *

In order for the debtor in possession to prime and try to restore the sick business operation, under prodding from the creditors committee and direction of the court it is given the authority to discard burdensome executory contracts. Sec. 313(1) of the Bankruptcy Act, 11 USC 713(1).

> 'Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties hereinabove and

elsewhere in this chapter conferred and imposed upon it-

'(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;"

* * *

"[5] Section 353 of the Bankruptcy Act, 11 USC 753, provides that when rejected, the offended party simply becomes a creditor. Only one special case noted, and that is the landlord, but even here his claim is that of a general unsecured creditor.

"What could be more natural than a debtor-in-possession reducing staff in trying to work out a Chapter XI? The only right to severance pay is based on the earlier determination [6] of this court that these employees enjoyed the right to severance pay as an incident to their employment, a contractual right which the debtor most naturally finds burdensome and rejected.

"Severance pay" has been described as wages.

'The claims under the layoff provision of the contract are for wages. The provision protects against a sudden, unexpected and unprepared for stoppage of wages. It provides that knowledge of a break in the continuity of work and consequent lack of pay shall be given the employee and it is the employer's duty to give it. If he does not give it, the wages continue unaffected for the term of the required notice. Whether the layoff occurs through bankruptcy or any other cause does not affect the validity of this wage requirement. For the lack of a better term, we call this contractual arrangement one for severance pay."

In re Public Ledger, 161 F. 2d 762 at 760 (3rd Cir. 1947), 'severance pay' is denominated wages.

"To find otherwise would mean that the cash-poor, sick company needing rehabilitation because of an unduly large payrool must either have the good sense to fire everyone with severance pay before Chapter XI (if it had shown good sense it probably wouldn't be in Chapter XI), or face the court with the problem of retaining excessive overhead because it couldn't afford to fire them—just what Sec. 313(1) allowing rejection of executory contracts was designed to avoid.

"This seems to be the result if *Straus-Duparquet, Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers, A F of L, CIO*, 386 F.2d 649 (2nd Cir. 1967) is applied. Enlightened management may find it impossible to reorganize while management that never offered severance pay, or in fact may not have even paid the previous year's wages, would get the full benefits of Sec. 313(1) and Sec. 64a(1) governing administrative expenses and Sec. 64a(2) governing wage priorities.

"Further, with all due respect, the *Straus-Duparquet* case doesn't discuss Sec. 64 of the Bankruptcy Act which lists the only grounds for priority. See Sec. 64a(1).

'The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition . . ."

"[7] The court considers the sole operative fact

to be the termination during the Chapter XI that triggered the claim for severance pay; but isn't that true of every executory contract? By contrast, Sec. 64a(a) in order for there to be an administrative expense requires that the expense be " . . . actual and necessary costs and expenses of preserving the estate subsequent to filing the petition." Exactly the opposite is true here. This expense offers no benefit to the funds under the court's administration nor does it aid in financing the plan, nor does it aid in providing ratable distribution to all unsecured creditors.

> See *Otte, Trustee in Bankruptcy v. United States et al.*, U.S. Supreme Court, November 19, 1974. 43 Law week, 4008.

"The question of wage priority is expressly covered in Sec. 64a(2).

> "Debts Which Have Priority. a.(2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding . . ."

"These are continuing wages that were earned prior to the filing of the Chapter XI that became payable on termination of employment. The debtor in possession having already paid four weeks severance pay, the $600 priority has been exhausted and the balance of the severance wage claim is properly treated as damages for rejection of the executory contract for severance pay.

* * *

"Whether the debtor in possession could in fact have legally paid more than $600 in severance pay has not been raised and need not now be decided.

"In similar problems of chapter administration,

cases dealing with this question of administrative expense based on the triggering incident taking place after filing, courts have not found that enough to make them administrative expenses.

"The courts have held that taxes that fall due during administration for pre Chapter wages were not expenses of administration since they did not protect or develop the debtor in possession estate. The same with salesmen's commissions on orders filled after the filing.

> [8] *In re Connecticut Motor Lines, Inc.*, 336 F.2d 96 (3rd Cir. 1964)
> *Denton & Anderson Co. v. Induction Heating Corp.*, 178 F.2d 841 (2d Cir. 1949).
> *In re American Anthracite & Bituminous Coal Corp.*, 171 F.Supp. 377 (S.D.N.Y. 1959), aff'd 280 F.2d 119 (2d Cir. 1959).

"In a recent decision the Supreme Court rejected as administrative expense withholding taxes that accrued on wage claims paid after the filing and pointed to the error in the too liberal assumptions of taxes as part of administrative expense rather than as part of the wage priority.

> 'We similarly reject the first priority, although we recognize that this appears to be the favorite conclusion reached by those courts that have passed upon the issue. See n. 3, *supra*. The leading case for this approach is *United States v. Fogarty*, *supra*. The Court there, however, without a statement of underlying reasons, merely concluded that the taxes 'should be allowed and classified as an expense of administration,' 164 F.2d, at 33. In *Lines v. State of California, Dept., of Employment*, *supra*, the court followed

Fogarty and held that, because the tax accrued 'subsequent to the filing of the petition in Bankruptcy, such tax had the character of an expense of administration.' 246 F.2d, at 71.'

Otte, Trustee in Bankruptcy v. United States et al. U.S. Supreme Court November 19, 1974, 43, Law Week, 4008.

"It hardly seems that wages should be allowed a higher status than taxes, especially since the implied agreement to pay severance pay was that of the debtor, not the debtor in possession. [9] In the *American Anthracite & Bituminous Coal Corp.* case, *supra*, the 2nd Circuit, in denying administrative expense status for the rejection of an executory contract, stated:

'Where no benefits are received by the bankrupt estate or its representative under the contract, and the contract is not assumed, the creditor's claim is not entitled to priority, . . . although of course, upon rejection, the creditor may file a general claim against the estate . . . 280 F.2d at 124-125.

"Here the only benefit conferred upon the debtor in possession by the presence of the appellants' ships for the period between the filing of the petition and the rejection was the value of the option either to accept or reject the charter. The same sort of benefit would be realized in the case of a lease or real property not occupied by the debtor; yet in exactly such a situation we denied any priority, *In re United Cigar Stores Co.*, 2nd Cir., 69 F.2d 513, certiorari denied sub nom. *Reisenwebers, Inc. v. Irving Trust Co.*,

1934, 293 U.S. 566, 55 S.Ct. 76, 79 L.Ed. 665." 280 F.2d at 126.'

"While not directly relevant, the Report of the Commission on the Bankruptcy Laws of the United States (93rd Congress, 1st Session, House Doc. No. 93-137) is of interest insofar as it represents an attempt by a number of experts in the field of bankruptcy law to reform and revise the Bankruptcy Act of 1898 as presently in effect. The Report deals with the question of severance pay, vacation pay and similar fringe benefits, and recognizes that such fringe benefits constitute a form of compensation which, like wages, should be afforded priority in the distribution of a bankrupt's estate. The Report recommends that the $600 wage priority presently contained in Section 64a(2) be increased to $1,200, and that severance and vacation pay be treated as wages entitled to that priority, subject to the $1,200 limit. Report of the Commission on the Bankruptcy Laws of the United States, Part I, pages 214-215, and Part II, Section 4-405(3) and (4) and Notes 3 and 4 thereto, at pages 109-112."

The reasoning of the Second Circuit with respect to severance pay as expressed *In the Matter of Straus-Duparquet*, is as follows:

"Severance pay was properly held to be an expense of administration. Severance pay is not earned from day to day and does not 'accrue' so that a proportionate part is payable under any circumstances. After the period of eligibility is served, the full severance pay is due whenever termination of employment occurs. Severance pay is a form of compensation for the termination of the employment relation, for reasons other than the displaced employees' misconduct, primarily to alleviate the consequent need for economic

> readjustment but also to recompense him for certain losses attributable to the dismissal. *Adams v. Jersey Central Power & Light Company*, 21 N.J. 8, 13-14, 120 A2d 737, 740 (1956).
>
> Since severance pay is compensation for termination of employment and since the employment of these claimants was terminated as an incident of the administration of the bankrupt's estate, severance pay was an expense of administration and is entitled to priority as such an expense." (at p. 651).

Most of the cases throughout the other Circuits have treated severance pay as a priority wage claim rather than an administration claim. In the only other case holding severance pay to be an administration claim in part, *In Re Public Ledger*, 161 F.2d 762 (3d Cir., 1947), the Court said that that portion of the severance pay earned after the filing of the petition was to be treated as an administration claim and that portion earned prior to the filing was to be treated within the provisions of Section 64a(2) of the Bankruptcy Act. Thus, the Court said, at page 774:

> "As a recapitulation, under the Guild contract the money to be paid under the provision for discharge pay is held to be wages and entitled to payment out of the estate. That part earned under the administration of the trustees is entitled to priority as administration expenses, §64, sub. a(1). That part earned within the provisions of §64, sub. a(2) is entitled to the priority provided for by that section of the Bankruptcy Act. (Here the severance pay was conditioned upon a given length of service.)"

Closer to the reasoning of this Court in *Straus-Duparquet* that severance pay is compensation for termination of employment rather than wages is ***In Re Ad Service Engraving Company***, 338 F.2d 41 (6th Cir., 1964), where the Court held that termination pay constitutes

damages rather than wages earned, but reached an entirely contrary result and held that severance pay claims were equivalent merely to general unsecured claims and should be denied priority under Section 64a(2).

Assuming the validity of the general rule that severance pay is entitled to a Section 64a(2) priority, the Court in *Straus-Duparquet* changed the claim from a wage claim to a damage claim with a super priority. In attempting to alleviate the consequences of loss of employment, the Court extended the Section 64a(2) priority and treated severance pay claims as liquidated damages.

We respectfully submit that there is no warrant in law or equity for such a result. Other creditors who suffered damages as the result of the filing of a Chapter XI petition or acts of the debtor consequent to that filing are relegated to general unsecured claims, or to specific statutory relief as set forth in the Bankruptcy Act. An obvious example is a landlord with whom a debtor had a lease which the debtor seeks to terminate under the protection of the Bankruptcy Court. By statute the landlord is relegated to a general unsecured claim for damages, equivalent to three years rental. Congress, in enacting Section 64a(2) of the Bankruptcy Act, set forth specific statutory relief for wage earners. We respectfully submit that there is no general equity power in the court to extend such statutory relief to the super priority we have ascribed to the beneficiaries of the holding in *Straus-Duparquet*.

If the court appropriately balances the equities in such a case, in this case the contrary holding would be required. Although the original claim of the Appellee was on behalf of approximately 56 employees of the Union, by stipulation approved by the Bankruptcy Court, the result was made to apply to all employees similarly situated. In this case then,

the debtor would be subject to an immediate payment of more than $600,000 to the former employees upon confirmation of a plan of arrangement (A-4). Such a required payment might in fact prevent a satisfactory plan from being proposed and confirmed. Here, in order to survive, Bohack was forced to go out of its warehouse and delivery business completely and change the whole nature of its operation to a purely retail supermarket chain, significantly reduced in size and scale. The imposition of an additional burden of an unwarranted administration claim would create great hardship to the other creditors of Bohack, many of whom, primarily the trade creditors, were as intimately concerned with the day-to-day business of Bohack as Bohack's own employees, and who in many cases suffered almost as much as the employees.

As noted before, *In Re Public Ledger*, is the case most cited for the proposition that priority should be attributed to severance pay claims, and in that case, as well as others facing that issue, a variety of labor contracts were interpreted in such a way so that any claim for any kind of compensation in lieu of dismissal notice or on account of dismissal could be considered severance pay for the purpose of attaining a priority under Section 64a(2) of the Bankruptcy Act. In none of them, however, was a 64a(1) preference granted. See *McCloskey v. Division of Labor Law Enforcement*, 200 F.2d 402 (9th Cir., 1952); *In Re Otto*, 146 F.Supp. 786 (D.C. Cal., 1956); *In Re Men's Clothing Code Authority*, 71 F.Supp. 469 (S.D.N.Y. 1937).

In conclusion, it is respectfully submitted that the holding of the Second Circuit *In the Matter of Straus-Duparquet* extends the statutory relief to be granted to employees of companies seeking protection under the Bankruptcy Act beyond the scope of the congressional

intent and beyond all other decisional law in the federal system. Although the court was obviously attempting to seek an appropriate result for the protection of the people employed by the debtor in *Straus-Duparquet*, to work such a result in this case would severely hamper the proposal and implementation of a successful plan of arrangement, and thus, the equitable nature of the court's relief would work a greater inequity on the remaining employees of the debtor.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

J. STANLEY SHAW
Attorney for Petitioner
A member of the Bar of the
United States Supreme Court

OTTERBOURG, STEINDLER, HOUSTON & ROSEN,
by CONRAD B. DUBERSTEIN

A member of the Bar of the
United States Supreme Court

and

FINKEL, NADLER and GOLDSTEIN
by HARVEY GOLDSTEIN,
Attorneys for the
official creditors committee.

APPENDICES

Order of District Court dated February 20, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Bankruptcy No. 74-B-933

In the Matter of

THE BOHACK CORPORATION,

Debtor.

GENERAL WAREHOUSEMEN'S UNION, LOCAL #852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,

Plaintiff,
Defendant.

Plaintiff, General Warehousemen's Union Local #852, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as agent, instituted a suit against the Defendant, The Bohack Corporation, seeking judgment in the composite amount of $43,526.49 as and for severance pay accrued in behalf of former warehouse employees of the Defendant.

Thereafter, and on the 22nd day of January, 1975, in the course of an informal hearing on Defendant's application for a temporary injunction, the parties hereto entered into a stipulation providing for the payment of the aforesaid severance pay. The Defendant, however, reserved its right to appeal as to the propriety of the Court's declared intention to adhere to the decision rendered by the Circuit

Court of Appeals in the matter of *Straus-Du Parquet, Inc. v. Local Union No. 3, International Brotherhood of Electrical Workers, A.F. of L., C.I.O.*, 386 Fed 2d 649, wherein the Court held that severance pay constitutes an administration claim.

Constant with the foregoing, it is ORDERED, ADJUDGED and DECREED that the claim for severance pay herein is deemed an expense of administration and that the Plaintiff have judgment therefor, pursuant to the provisions of the stipulation aforesaid.

s/C. Albert Parente
C. ALBERT PARENTE
Bankruptcy Judge

Dated: February 20, 1975
Jamaica, N.Y.

* * *

STIPULATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In the Matter of

THE BOHACK CORPORATION,

Debtor

GENERAL WAREHOUSEMEN'S UNION, LOCAL No. 852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,

Plaintiff-Appellee,

-against-

THE BOHACK CORPORATION,

Defendant-Appellant.

IT IS HEREBY STIPULATED by and between the attorneys for The Bohack Corporation, Debtor-in-Possession and General Warehousemen's Union Local No. 852 that the order and decision of the Hon. C. Albert Parente, Bankruptcy Judge entered on or about February

20, 1975, with respect to the payment of severance pay as an administration claim shall be binding with respect to all members of the Union situated similarly to those members of the Union in behalf of whom an action was brought for the sum of $43,526.49.

IT IS FURTHER STIPULATED AND AGREED that the amount due from the Debtor-in-Possession to those persons similarly situated, included those in whose behalf the action was brought, is $607,511.60.

IT IS FURTHER STIPULATED AND AGREED that any appeals from such order of Judge Parente shall be considered to cover all members of the Union similarly situated whether or not suit was brought in their behalf, and that the amount in question shall be deemed to be $607,511.60.

Dated: New York, N.Y.
April 29, 1975

s/J. Stanley Shaw
J. STANLEY SHAW
Attorney for The Bohack Corporation,
Debtor-in-Possession

LEONARD SCHWARTZ,
Attorney for General Warehousemen's Union,
Local No. 852

DISTRICT COURT MEMORANDUM DECISION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In the Matter of

THE BOHACK CORPORATION,

Debtor.

GENERAL WAREHOUSEMEN'S UNION LOCAL NO. 852, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as agent,

Plaintiff-Respondent,

-against-

THE BOHACK CORPORATION,

Defendant-Appellant.

Appeal from the order made and entered by th3 Honorable C. Albert Parente, Bankruptcy Judge, on February 20, 1975, in favor of General Warehousemen's Union Local No. 852, etc., plaintiff-respondent, directing

the Bohack Corporation, debtor, to pay the sum of $43,526.49 as an expense of administration.*

The order is affirmed.

s/
U.S.D.J.

* May 28, 1975—By stipulation dated April 29, 1975, the parties agree that the final determination in this proceeding shall bind all members of the Union similarly situated, and in the event the Union prevails the total amount due the class from the debtor in possession is in the sum of $607,511.60.

s/Jacob Michler
U.S.D.J.

ORDER AND JUDGMENT OF COURT OF APPEALS

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of December, one thousand nine hundred and seventy-five

Present:
HON. JAMES L. OAKES
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges,

In the Matter of

THE BOHACK CORPORATION,

Debtor

General Warehousemen's Union Local #852, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as agent,

Plaintiff-Appellee,

v.

The Bohack Corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the authority of *Straus-Duparquet Inc. v. Local Union No. 3 International Brotherhood of Electrical Workers, AF of L, CIO*, 386 F2d 649, (2nd Cir. 1967)

s/James L. Oakes
s/Ellsworth A. Van Graafeiland
s/Thomas J. Meskill
USCJJ